

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
GOVERNMENT OF THE UNITED STATES ex rel
ROBERT SHABAN

Petitioner-Appellee

- against -

STANLEY ESSEN, Director of the Brooklyn
Rehabilitation center, NEW YORK STATE
DRUG ABUSE CONTROL COMMISSION,

Respondent-Appellants
-----x

BRIEF FOR APPELLEE

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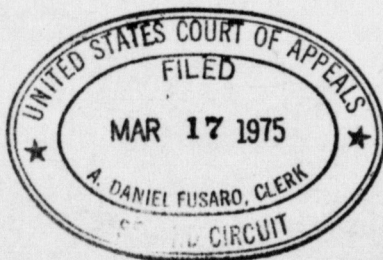


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GOVERNMENT OF THE UNITED STATES :
EX REL ROBERT SHABAN :
 :
Petitioner- : 75 - 2008
Appellee :
 :
- against - :
 :
STANLEY ESSEN, DIRECTOR OF THE :
BROOKLYN REHABILITATION CENTER, :
NEW YORK STATE DRUG ABUSE CONTROL :
COMMISSION, :
 :
Respondents- :
Appellants. :
 :
-----x

BRIEF FOR APPELLEE

STATEMENT

This is an appeal by the State of New York from an order of the United States District Court for the Eastern District of New York (PLATT, J.) dated December 24, 1974 sustaining a writ of habeas corpus and directing the New York State Drug Abuse Control Commission to release the appellee "to after-care status to which he was released by the Drug Abuse Control Commission in December 1972" from an in-resident status (confinement) to which he had been placed in December 3, 1974.

QUESTIONS PRESENTED

Does the United States District Court have jurisdiction of a writ of habeas corpus where there is a claim of violation of due process under the United States Constitution ?

Does the United States District Court have jurisdiction of a writ of habeas corpus where the petitioner has not exhausted all his State remedies where the State procedures do or will not provide swift review of the petitioner's claims ?

Does a Judge of the District Court of the United States in a proceeding of a writ of habeas corpus have the power to determine the Constitutionality of a State statute without having the matter referred to a "Three-Judge-Court" pursuant to Section 2281 Title 28 USC ?

ARGUMENT

POINT ONE

THE UNITED STATES DISTRICT COURT HAS
JURISDICTION OF A WRIT OF HABEAS CORPUS WHERE
VIOLATION OF A CONSTITUTIONAL RIGHT IS CLAIMED.

The United States District Court has civil jurisdiction where the controversy exceeds the sum or value of \$10,000.00 and arises under the Constitution of the United States Constitution, 28 USC 1331.

"Fundamental Constitutional rights are almost by definition worth more than \$10,000.00 for the purpose of \$10,000.00 jurisdictional amount requirement ", CCCO-Western Region v Fellows, DC Cal 1973, 359 F Supp 644.

Any suit where the claim is lack of jurisdiction must not be dismissed for lack of jurisdiction unless it appears to a legal certainty, that the claim of violation of one's constitutional rights are wholly insubstantial and frivolous so far as the Constitution and the laws of the United States are concerned, Bela Seating Co v Advance Transport Co., DC Ill 1972, 344 F Supp 854.

All rights under the Federal Constitution are always a proper subject for federal adjudication, Ince v Rockefeller, DC NY, 1968, 290 F Supp 878.

It is respectfully submitted that the claimed violation in the instant case was that the petitioner-appellee was illegally and unlawfully deprived of his liberty without due process of law under the 14th Amendment, United States Constitution; Ball v Jones, 43 AD2d 281, 351 NYS2d 199, (1974); and

Morrissey v Brewer, 408 US 471 (1972), and therefore the United States District Court did in fact have jurisdiction of the habeas corpus proceeding and further had original jurisdiction of the proceeding without any regard to any proceeding in the State of New York.

POINT TWO

THE DISTRICT COURT PROPERLY REJECTED
APPELLANTS CONTENTION THAT THE DISTRICT COURT
DID NOT HAVE JURISDICATION BECAUSE THE PETITIONER
DID NOT EXHAUST HIS STATE REMEDIES.

In the instant case the petition for a writ of habeas corpus in the State Supreme Court was improperly denied by a State Supreme Court Judge and dismissed without a hearing in one of the most gross abuse of judicial authority and lack of knowledge of the law that the undersigned has ever seen or heard.

In the attempt to secure a prompt appeal of the dismissal of the writ without a hearing and patently improper decision of the State Supreme Court Judge, a motion was made in the Appellate Division, Second Department, for an order granting to the petitioner a speedy hearing of his appeal in view of the fact that he was being deprived of his liberty without due

process of law. The attorney for the State of New York and the Drug Abuse Control Commission, the office of the Attorney General of the State of New York opposed the petitioner's motion for a preference for a speedy hearing on his appeal by affidavit in which the attorney alleged to the Appellate Court that there was not merit to the appeal and requested the Appellate Division as follows, " WHEREFORE, deponent"....(Alfred P Crisco, Assistant State Attorney General, counsel for the Drug Abuse Control Commission and the State of New York)"prays that the petitioner's application for a order permitting an immediate appeal herein be denied. " The request for an immediate appeal of the incarceration of the petitioner was denied by the appellate Division (Appendix to Appellant's brief, Page A-25).

On December 20, 1974 before the Honorable Thomas C. Platt, District Court Judge, a conference was held between the attorney for the petitioner and the attorneys for the State of New York wherein Judge Platt offered the State of New York, or more particularly, the attorneys from the Attorney General's Office the opportunity to accompany the petitioner's counsel "across the street" (minutes , hearing before Judge Platt December 20, 1974, pages 22, 23 and 24; Appendix for Appellants, page A-30) to the Appellate Division to consent to a speedy hearing as the Appellate Division does all the time in election cases, in which case he (Platt) would defer hearing the matter until decided by the Appellate Division of the State of New York.

The attorneys for the State of New York refused to assist in any manner to get a speedy hearing of the appeal from the dismissal of the petitioner's writ of habeas corpus (minutes hearing December 20, 1974 before Platt, J. pages 22-23, lines 18 forward; Appendix to Appellant's Brief, page A-30).

The Court thereafter affirmed its decision to hold a hearing on the petitioner's writ of habeas corpus in the Federal Court and set Tuesday, December 24, 1974 for the said hearing.

As properly determined by the District Court, citing Jones v Tubman, 360 F Supp 1298-1300, DC SDNY 1973, that "where State procedures do not provide swift review of petitioner's claims" exhaustion of State remedies is not mandated. That further, on the facts of the instant case, the District Court came to the just and proper conclusion that the petitioner had no further adequate State Remedy.

It has been argued at great length by the Appellants in the State Supreme Court, State Appellate Division, and the Federal District Court that the decision in the Appellate Court, to wit, BALL v JONES, 351 NYS2d 199 is not definitive since an order staying the mandate of the Appellate Division in the BALL case was granted by the New York State Court of Appeals and that as of this date no decision has been rendered by the said Court of Appeals.

The facts of the Ball case (supra and 342NYS2d 689) and the associated case, PANNELL v JONES, 351 NYS2d 199 are important with respect to adequate State remedy. In the Ball case, the plaintiff, William Lee Ball was certified an addict in 1971, release from in-resident care status to after-care status in April 1972. After a few days of liberty, excessive intake of alcohol and erratic reporting resulted in his (Ball) after-care status being revoked and being returned to an inresident status. In the companion case, Pannell v Jones, supra, Pannell a narcotic certificant was release from in resident status to after care status on June 28, 1972; was convicted of disorderly conduct a few days later; and was thereupon seized by the Narcotic Commission, had his after-care status revoked and was remanded to in-patient status.

In April 1973, the case appeared in the New York Supreme Court, Erie County concerning the validity of the revocation of the after-care status. The plaintiffs in the action have now been confined for approximately eight months. The Supreme Court, Goldman, J. ruled that before a certificant's after-care status may be revoked he was entitled to a hearing citing U.S. V MORRISSEY, 408 U.S. 471 (1972) and People ex rel Menechino v Warden, 27 NY2d 376, 318 NYS2d 449, and granted an injunction against the State Narcotic Commission.

The State of New York Appealed the decision of Judge Goldman, Supreme Court Erie County to the Appellate Division,

Fourth Department.

In January 1974, the Appellate Division, Fourth Department affirmed the ruling of the Supreme Court. The State of New York, once again, appealed from the decision of the Appellate Division to the New York State Court of Appeals and in the process secured a stay of mandate of the lower courts. The plaintiffs now have been incarcerated for a period of 23 months.

It is now March 1975, almost three years after the incarceration of Ball and Pennell and if one accepts the theory of the appellant's herein, the said BALL and Pennell have not yet exhausted their remedies in the State Courts, notwithstanding the fact that they may have been incarcerated improperly for almost the past three years. Based upon the foregoing, one wonders if the contention of the Appellants is correct, whether this petitioner-appellee would be required to serve one--,two-- or perhaps three years of incarceration while "exhausting" his State remedies before he may seek redress for violation of his basic constitutional rights in the Federal Courts in the deprivation of his liberty without due process of law.

It is respectfully submitted that the District Court properly determined that the petitioner had exhausted all

meaningful State remedies, and that his only recourse to litigation of the Constitutionality of his incarceration was by way of a habeas corpus proceeding in the Federal District Court.

POINT THREE

THE DISTRICT COURT HAD THE AUTHORITY TO RULE ON THE CONSTITUTIONALITY OF A STATUTE IN A HABEAS CORPUS PROCEEDING AND WAS NOT REQUIRED TO HAVE THE MATTER HEARD AND DETERMINED BY A THREE JUDGE COURT.

The requirement for a three judge court under 28 U.S.C. 2281 where the constitutionality of a State Statute is called into question is not applicable to writs of habeas corpus proceedings. "The Federal Courts have repeatedly held that Section 2281 has no relation to habeas corpus proceedings" and that a single judge is sufficient to make such a determination in such a proceeding, *Wilson v Gooding*, 431 F 2d 855 (5th Cir. 1970); *U.S. ex rel Murray v Owens*, 341 F Supp. 722 S.D.N.Y. 1972); *United States v York*, 281 F Supp. 8, 12 (DC Conn. 1968); *Scott v Dist. Attorney, Jefferson Parish, State of Louisiana*, 309 F.Supp. 833 (ED La 1970), *aff'd* 437 F 2d 500; *Bell v Horgisto*, 346 F. Supp. 1392 (N.D. Cal 1972); *U.S. ex rel Murphy v Warden of Clinton Prison*, 29 F.Supp/ 486,489 (N.D. N.Y. 1939), *aff'd* 108 F 2d 861 (2d Cir),

cert. denied, 309 U.S. 661, 60 S.Ct. 583; U.S. ex rel Laino v Warden of Wallkill Prison, 246 F.Supp. 72, 93 N.E. 16 (S.D. N.Y. 1965) aff'd 355 F. 2d 208 (2d Cir. 1966); U.S. ex rel Watkins v Com of Pa., 214 F.Supp. 913 (W.D. Pa. 1963) and Tender v Cox, 317 F.Supp.33 D.C. Va. 1970).

C O N C L U S I O N

1. THAT THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

2. THAT SECTION 81.30 OF THE NEW YORK STATE MENTAL HYGIENE LAW WHICH PROVIDES IN PART :

"The commission shall establish regulations and standards for release and after care placement of drug dependant persons. The commission shall have power to order any drug dependant person from after care supervision to in patient treatment..."

BE DECLARED TO BE UNCONSTITUTIONAL AND IN VIOLATION OF THE RIGHTS GUARANTEED TO ALL PERSONS BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION THAT NO PERSON SHALL BE DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

3. THAT A DECISION BE RENDERED THAT PRIOR TO DEPRIVING A PERSON OF HIS LIBERTY IN LIKE CASES, THAT A PERSON BE ENTITLED TO:

A. A PRELIMINARY HEARING BE REQUIRED GUARANTEEING THE FOLLOWING RIGHTS (Morrissey v Brewer, supra and Gagnor v Scapelli, 411 U.S. 778, 782, aff'd sub nom. Gonsolus v Gagnon, 454 F 2d 416 (7th Cir 1972)

(1) Notice of the alleged violations or alleged misconduct

(2) Opportunity to appear and present evidence on own behalf

(3) Conditional right to confront witnesses

(4) independent decision maker, and

(5) Written report of the hearing

B. A FINAL HEARING BE REQUIRED GUARANTEEING THE FOLLOWING RIGHTS (Gagnor v Scapelli, supra)

(1) Written notice of claimed violations or misconduct

(2) Disclosure of evidence against the respondent

(3) Opportunity to be heard in person, present witnesses and documentary evidence

(4) Right to confront and cross examine adverse witnesses (unless hearing officer finds good cause for not allowing confrontation)

(5) A "neutral and detached" hearing body.

(6) Permission to be represented by counsel and the assignment of counsel upon request of respondent or where respondent cannot adequately represent himself (Mempas v Rhay 389 U.S. 128)

(7) A verbatim record of the proceedings

(8) A written statement by the factfinder as to the evidence relied on and the reasons for

UNITED STATES COURT OF APPEALS
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GOVERNMENT OF THE UNITED STATES ex rel
ROBERT SHABAN

Petitioner-Appellee

75 - 2008

- against -

STANLEY ESSEN, DIRECTOR OF THE BROOKLYN
REHABILITATION CENTER, NEW YORK STATE
DRUG ABUSE COMMISSION

Respondent-Appellant

-----X

STATE OF NEW YORK
COUNTY OF KINGS

CLARA KRELL, being duly sworn, deposes and says:

That your deponent is the secretary of Joel H Brettschneider with offices at 26 Court Street, Brooklyn, New York, is not a party to this action and is over the age of 18 years.

That on the 12th day of March 1975, she served the within "APPELLE~~E~~^Es BRIEF" upon the Hon Louis J Lefkowitz, Attorney General of the State of New York, attorney for the Respondent-Appellant in this action at 2 World Trade Center, New York, New York, the address designated by the said attorney for that purpose by depositing a true copy of same enclosed in a post paid properly addressed envelope in an official depository under the exclusive control of the U.S. Postoffice.

Sworn to before me this
12th day of March 1975

Clara Krell

JOEL H. BRETTSCHEIDER
Notary Public, State of New York
No. 30-5443410
Qualified in Nassau County
Commission Expires March 30, 1976

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within
has been compared by the undersigned with the original and
found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is
the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent
further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

deponent is the
read the foregoing
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and
belief, and that as to those matters deponent believes it to be true.
Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss.:

CORPORATE VERIFICATION

of
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States post office department within the State of New York.

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

JOEL H. BRETTSCHEIDER

Attorney for

Office and Post Office Address

26 Court Street
BROOKLYN, NEW YORK 11242

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

JOEL H. BRETTSCHEIDER

Attorney for

Office and Post Office Address

26 Court Street
BROOKLYN, NEW YORK 11242

To

Attorney(s) for

Index No. 2008

Year 19 75

UNITED STATES COURT OF APPEALS
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GOVERNMENT OF THE UNITED STATES
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Petitioner-
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- against -

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Respondent

AFFIDAVIT OF SERVICE

JOEL H. BRETTSCHEIDER

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BROOKLYN, NEW YORK 11242

Tel. 212-875-5316

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

revoking after care status.

DATED: Brooklyn, New York
March 8, 1975

Respectfully submitted,

JOEL H BRETTSCHEIDER

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JOEL H BRETTSCHEIDER, ESQ.

of counsel